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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

TRANSCRIPT OF SPECIAL HEARING
BEFORE THE HONORABLE STEVEN J. McCAULLIFE

Appearances:

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Gordon J. MacDonald, Esq.
Anthony Galdieri, Esq.

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For the Defendants: Nancy Smith, Esq.
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By Telephone: Ethan P. Davis, Esq.
US Dept. of Justice

Court Reporter: Sandra L. Bailey, LCR, CM, CRR
Official Court Reporter
U.S. District Court
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1 BEFORE THE COURT

2 THE CLERK: The court is in session and has
3 for consideration a hearing in Dartmough-Hitchcock
4 Clinic versus the New Hampshire Department of Health and
5 Human Services, Civil Case Number 11-cv-358-SM.

6 THE COURT: All right, good morning. I
7 didn't, Attorney Smith, I didn't continue the hearing
8 even though your motion was well taken. The point is to
9 get the government's, the federal government's
10 perspective, but -- I guess we have Mr. Davis. Are you
11 on the phone, Mr. Davis?

12 MR. DAVIS: Yes, your Honor, I'm here. Ethan
13 Davis for the Secretary.

14 THE COURT: Okay. Good morning and thanks for
15 appearing, not that you had a number of choices.

16 I wanted you on the phone because the state
17 has correctly analyzed the situation. I really do need
18 to know what the Secretary is doing, if anything, what
19 she plans to do, if anything, and how her views might
20 impact the resolution of this claim. And your pleading
21 is a mystery to me. I don't know what you're saying.
22 It sounded like you were saying we're not sure we want
23 to tell you what we think. And that of course is not
24 acceptable.

25 MR. DAVIS: Your Honor, I first just want to

1 apologize for the delay in getting the Secretary's views
2 in front of the court, and I want to --

3 THE COURT: I'm not concerned about the delay.

4 I'm concerned about the suggestion in your pleading
5 that, you know, we haven't quite decided whether or not
6 we're going to tell you whether we're going to tell you.

7 MR. DAVIS: Your Honor, I just want to assure
8 you that CMS is considering whether to approve the State
9 Plan amendments that the plaintiffs challenge here.
10 People at CMS are working hard on this and we believe
11 our participation would be substantially more valuable
12 after CMS makes its decision on the plan amendments and
13 we'd like to respectfully ask for your patience in that
14 regard.

15 I also wanted to point out on this score that
16 many of these plan amendments are on their second clock
17 which expires on December 19, 2012. So, a decision
18 should be reached by that date. I can assure you're not
19 looking at an indefinite --

20 THE COURT: No, let me be clear. You know,
21 here's the question. Is this within the Secretary's
22 wheelhouse or is it not? Does she claim primary
23 jurisdiction over resolution of this matter or does she
24 not? Is she indifferent? Does she waive primary
25 jurisdiction? Does she think it matters?

1 All of those are matters of interest to the
2 court, and if you read the Douglas opinion, which I'm
3 sure you're quite familiar with, the Supreme Court
4 seemed to think those were important questions and the
5 court should be interested in what the Secretary has to
6 say with regard to Medicaid rate reductions. And your
7 pleading suggests, well, I'm not so sure we're
8 interested in telling you.

9 So, the first thing I want to hear is, no, we
10 are interested in telling you.

11 MR. DAVIS: Your Honor, I have to get
12 authorization from my client to file a substantive
13 brief.

14 THE COURT: No, I don't think you're hearing
15 me. I want an assurance from you that the Secretary is
16 interested in telling the court what the Secretary
17 thinks about a matter committed to her jurisdiction, if
18 it is.

19 MR. DAVIS: Your Honor, the only thing I can
20 tell you at this point is that your request for the
21 Secretary's views is under consideration. I do not have
22 approval yet to make any firm commitments.

23 THE COURT: Yeah, I guess you're not
24 listening. I'm not asking for her views. I'm asking to
25 hear you tell me that she's interested in communicating

1 them.

2 MR. DAVIS: Your Honor, I think the
3 Secretary's decision on the State Plan amendment, I
4 mean, just the fact that the Secretary is --

5 THE COURT: Here's the issue. See if you can
6 follow this. The plaintiffs here say that these
7 Medicaid rate reductions were the illegitimate product
8 of action taken pursuant to state statutes that conflict
9 with federal law. Okay?

10 MR. DAVIS: Yes, your Honor.

11 THE COURT: All right. The federal
12 government, the Secretary, has an interest in
13 determining whether Medicaid rate reductions are or are
14 not legitimate pursuant to federal law. Correct?

15 MR. DAVIS: That is correct.

16 THE COURT: Okay. It seems to me that it's
17 important to know whether the Secretary thinks or
18 doesn't think these rate reductions are consistent with
19 federal law, because it may have a lot to do with
20 whether equitable relief is affordable or not
21 affordable. Do you understand?

22 MR. DAVIS: Yes, your Honor, I understand that
23 point and what I'm --

24 THE COURT: But on the other hand, the
25 plaintiffs say, no, it doesn't matter whatsoever whether

1 the Secretary somehow thinks these are legitimate under
2 federal law because what matters is they were effected
3 pursuant to state law, and therefore they ought to be
4 enjoined.

5 What I need to know is what is the Secretary
6 doing? Is she looking at these Medicaid rate
7 reductions? Is she trying to determine whether or not
8 they are legitimate under federal law or not?

9 MR. DAVIS: Yes, your Honor.

10 THE COURT: Does she have some expectation
11 that there's going to be a decision? What have they
12 been doing for eight months other than exchanging
13 indecipherable letters back and forth with the state?

14 MR. DAVIS: Your Honor, CMS and the Secretary
15 are considering whether these State Plan amendments
16 comply with federal law or not. CMS has not reached a
17 decision on that point yet, but as I'm trying to hint as
18 best I can, the clock expires on December 19th. If CMS
19 does not act by that date, then the State Plan amendment
20 will be deemed approved and therefore consistent with
21 federal law.

22 So, I'm just asking for your Honor's patience
23 until CMS has a chance to express its view on whether
24 these plan amendments are consistent with federal law.
25 I think our participation will be substantially more

1 valuable at this point. I can assure you this is not an
2 indefinite delay.

3 THE COURT: All right, maybe you can just hold
4 on for a minute and let me hear from the parties.

5 Who is it, Mr. Gordon -- Mr. MacDonald -- Mr.
6 Gordan? What State Plan amendments are pending that
7 directly relate to each of the Medicaid rate reductions
8 about which you complain. Are there State Plan
9 amendments pending that address each of those rate
10 reductions?

11 MR. MacDONALD: There are State Plan
12 amendments pending which address some of the rate
13 reductions. There are State Plan amendments that the
14 state relied on, one, that's been withdrawn. And I
15 would submit, your Honor, it's a little frustrating to
16 hear whether the Secretary is able to tell your Honor
17 whether there is primary jurisdiction or not. But let's
18 just set that question --

19 THE COURT: I don't think Mr. Davis knows is
20 the problem.

21 MR. MacDONALD: Well --

22 THE COURT: I think the Secretary's position
23 actually would be of course there's primary
24 jurisdiction. Congress committed this process to the
25 Secretary for principal enforcement. Of course there's

1 primary jurisdiction. But it begs the question
2 somewhat. Is there an issue that needs to be resolved
3 that's critical to the resolution of your case?

4 MR. MacDONALD: I'd like to be heard on that.

5 But let's just set that aside. The doctrine of primary
6 jurisdiction is entirely discretionary. It's within
7 your judgment.

8 THE COURT: Well, it's not really. The First
9 Circuit's made it clear and the Supreme Court's made it
10 clear that if there's an issue that's critical to the
11 resolution of your claim that falls within the primary
12 jurisdiction of an administrative agency, then the First
13 Circuit says you should defer and wait that decision and
14 the Supreme Court says at a minimum the Secretary's
15 opinion would be very valuable and useful. And I agree
16 it probably would be.

17 MR. MacDONALD: May I, your Honor, just -- the
18 case that the court cited in waiving primary
19 jurisdiction --

20 THE COURT: That's not to say she can't waive
21 it, and Mr. Davis, in my view, is pretty close to
22 waiving it.

23 MR. MacDONALD: And that's my point. And the
24 other point is read Judge Torruella's opinion in that
25 case. He says that the helpfulness and the need to get

1 the agency's view must, must be balanced against the
2 considerations attending to the plaintiffs, including
3 delay. And our argument to you today, your Honor, is
4 that delay is irreparably harming the plaintiffs because
5 one of these rate reductions is void as a matter of law,
6 and you do not need to hear from the Secretary on that.
7 You just need to look at what the Commissioner did on
8 September 18, 2012. He withdrew the page on which the
9 state relied to effect the 33 percent outpatient rate
10 reduction.

11 THE COURT: All right, say that again.

12 MR. MacDONALD: On September 12th --
13 September 18th, I'm sorry, 2018 -- 2012, September 18,
14 2012 -- let's just step back, your Honor. In January,
15 your Honor, you had an extended back and forth --

16 THE COURT: If you go too detailed into these
17 enumerable exchanges of documents you're going to get
18 lost or I'm going to get lost.

19 MR. MacDONALD: I understand, your Honor, just
20 to lay the predicate.

21 THE COURT: It's not -- you're not -- I
22 understand they are enormously complicated in terms of
23 regulatory nuances, but it's not enormously complicated
24 in terms of legal questions in my view. They're either
25 legitimate or they're not. They either applied the

1 methodology or they didn't. They either gave the notice
2 or they didn't. There's either a State Plan amendment
3 pending or there isn't. It's either legitimate or it's
4 not under federal law. Those aren't difficult questions
5 to pose.

6 MR. MacDONALD: Okay. Cut to the chase. This
7 is a comment from CMS August 9, 2012. This is Exhibit B
8 to our filing, your Honor. Right here. NH 06-008. You
9 heard from the state in January that's the SPA and this
10 is the page the state relied on in effecting the
11 33 percent rate cut. CMS says, CMS suggests withdrawing
12 this page. No public notice was provided as part of
13 this SPA. Therefore, the effective dates are not --
14 neither of the effective dates is allowable.

15 CMS said, and this is actually reinforcing
16 your holding in March, there was no public comment. The
17 SPA was invalid. The rates are invalid. Okay?

18 THE COURT: Well, yes, however, the state then
19 pursuant to the injunction I issued gave notice. Right?

20 MR. MacDONALD: Yes.

21 THE COURT: And so I don't want to get too
22 lost into the retroactive effective dates of SPAs. I
23 really don't. Because I assume, and maybe wrongly, but
24 I assume the Secretary understands that sort of thing
25 and will make adjustments appropriately. Right?

1 MR. MacDONALD: Well, I hope the Secretary --

2 THE COURT: But going forward, the

3 Commissioner did notice those rate reductions after the
4 injunction. You complained about it but didn't
5 challenge it. So that notice stands. I assume there's
6 a SPA that followed that notice, the notice was related
7 to a SPA that then seeks to effect those Medicaid rate
8 reductions. Right?

9 MR. MacDONALD: No SPA.

10 THE COURT: No SPA?

11 MR. MacDONALD: No SPA. They're trying to
12 backdate it. They are trying to backdate it. And this
13 is very relevant, your Honor, I hope counsel for the
14 Secretary is listening. You found a likelihood of
15 success on the merits no public notice for this SPA.
16 They noticed it March 30, 2012. Right? Pursuant to
17 your order.

18 THE COURT: Well, I'm taking your
19 representation. They noticed it as to that SPA.

20 MR. MacDONALD: Right.

21 THE COURT: Okay.

22 MR. MacDONALD: Now, why is that important?
23 You make a very good point. It's prospective only. But
24 these rates haven't been paid yet. They are part of a
25 cost settlement process and each one of these years is

1 still open. State fiscal year '09, '10, '11 --

2 THE COURT: Yeah, I appreciate that and at
3 some point there will be a reconciliation, and to the
4 extent these rates were not lawfully accomplished there
5 will be a credit exchange. But the Secretary does that;
6 right?

7 MR. MacDONALD: No. That's a function of the
8 providers and the state.

9 THE COURT: Doesn't the Secretary say, for
10 example, I assume Mr. Davis would argue the Secretary is
11 on the verge, presumably, of actually making a decision
12 about these things, and once the Secretary makes a
13 decision -- say the decision is, you know, these were
14 totally illegitimate, contrary to federal law, they're
15 bad, however, we're going to allow these rate reductions
16 under certain conditions as they did in California in
17 the Douglas case and say, you know, monitor it, do some
18 studies, make sure people aren't deprived access to
19 medical care, et cetera, et cetera, et cetera.
20 Prospectively that takes care of your problem, doesn't
21 it? Retroactively, because as you point out, the
22 operation of these effective dates and so forth, there
23 will be an accounting. And to the extent those rates
24 aren't approved back to whenever the first legitimate
25 SPA was filed, then there's a credit.

1 MR. MacDONALD: Well --

2 THE COURT: So, which is an argument for why
3 wouldn't you let the Secretary exercise her expertise
4 and rule on the issue, because it answers the
5 fundamental question. Is there irreparable harm? And
6 the answer, isn't the answer no, there's no irreparable
7 harm if in the end you get paid what you're entitled to
8 be paid under federal law?

9 MR. MacDONALD: Well, I'll just give you an
10 example, your Honor, because this -- I'm playing real
11 life. One of the plaintiff hospitals received a notice
12 three days ago. Here's your reconciliation for 2009.
13 Sign by November 15th. They shouldn't sign. The rates
14 are illegal. The rates they're trying to enforce are
15 illegal. That's irreparable harm. They're being
16 confronted with the prospect of having to sign off on
17 the state's reconciliation based on illegal rates. And
18 it's not academic. It's a 33 percent rate cut. It's
19 millions of dollars across these plaintiff hospitals.
20 And, your Honor, the state --

21 THE COURT: Mr. Davis, I'm going to respect
22 the fact that you don't think you have any authority to
23 represent anybody here, so I'm not going to ask you this
24 question, but Attorney Smith, what's the harm of an
25 injunction entering saying, look, these rates, they've

1 met their burden of showing a likelihood of success on
2 the merits and these rate reductions are enjoined until
3 and unless the Secretary approves them. What's wrong
4 with that?

5 MS. SMITH: I believe we addressed --

6 THE COURT: If you're right, the Secretary is
7 is going to approve them.

8 MS. SMITH: Because the -- the harm is
9 demonstrated by what happened in California, that the
10 injunction was actually cited by CMS as a concern in
11 approving the SPAs when they were ready to -- that were
12 ultimately approved because if there's an injunction in
13 place, then the hospitals will have to pay back that
14 difference, and the CMS was concerned that that would
15 have an adverse affect on the providers where they would
16 have to then pay back an additional amount where the
17 injunction was --

18 THE COURT: Are you trying to save them from
19 themselves?

20 MS. SMITH: Yes.

21 THE COURT: They say they'll take that risk.
22 But what's the problem for the state. I don't see a
23 problem for the state really, do you?

24 MS. SMITH: The problem for the state is that
25 they will not be able to apply rates that were

1 legitimate and that they had the right to apply during
2 this period. And as you know, the state budget
3 situation is tight, and if we have to go ahead and pay
4 at higher rates than what are supposed to be in effect,
5 then that will be a problem for the state fiscal
6 situation.

7 THE COURT: But don't you agree with Mr.
8 MacDonald that the rules with regard to effective dates
9 on SPAs are fairly clear. They're only retroactive to
10 the quarter in which, the first day of the quarter in
11 which they were filed, right?

12 MS. SMITH: That goes back to the issue that
13 --

14 THE COURT: So legitimate or not, back to
15 whenever they are or were not, so what's the problem?
16 If the Secretary eventually approves it, the approval
17 will be retroactive to the effective date, whatever the
18 law allows.

19 MS. SMITH: If you would like me to address
20 the effective date issue --

21 THE COURT: Well, if you can succinctly,
22 what's the harm of an injunction that says they've met
23 their burden of showing that they are likely to succeed
24 on the merits in establishing that these Medicaid rate
25 reductions were the legitimate product of state action

1 directed by state officials, legislative and executive,
2 based upon state statutes that conflict directly with
3 federal law, and therefore they're enjoined, unless and
4 until the federal Secretary, who has primary
5 responsibility for administering this program, decides
6 that they are legitimate. What's wrong with that?

7 MS. SMITH: Because there is a huge and
8 irreparable harm to the state.

9 THE COURT: What is it?

10 MS. SMITH: In not being able to control the
11 expenditures in its Medicaid program which is what --

12 THE COURT: But you're not allowed to control
13 the expenditures in your Medicaid program except
14 consistently with the law.

15 MS. SMITH: And they are, these rates are
16 consistent with the law. If I could just show the court
17 --

18 THE COURT: But you know, I guess we, you
19 know, I thought we were past that point. But your own
20 director of Medicaid services for the state said no, we
21 didn't consider the federal law, we didn't do that. We
22 were told to reduce them by the legislature and governor
23 and we did. End of story. Now, hopefully, happily,
24 maybe they're still consistent with federal law, we're
25 hoping, but it's just really a hope, isn't it?

1 MS. SMITH: No, it's not. And I think we have
2 gone through and shown you in great detail why, and the
3 justifications that accompanied the --

4 THE COURT: I appreciate them both, by the
5 way, but I haven't had a chance to read --

6 MS. SMITH: -- that the rates were being
7 continued in 2012, we have shown that access has
8 continued under these rates for the entire period of the
9 last --

10 THE COURT: No, but the issue, the issue isn't
11 collateral, because the collateral fact is that there's
12 people still have access justifies the rate, it doesn't
13 work that way. It's did you apply the statute properly,
14 did you use the factors and consider them, did you apply
15 an accepted approved methodology, did you turn the crank
16 the right way, did you give notice, does it meet the
17 needs in sort of a subjective assessment way. It's not
18 just, hey, no harm, therefore legitimate.

19 MS. SMITH: If I could go back and go through
20 what Attorney MacDonald has talked about in regards to
21 the August 9th comments by CMS that he showed you and
22 show you what we contend is the relative part of that
23 record than the part he talked about --

24 THE COURT: Do you think there is a SPA
25 pending with respect to each and every Medicaid rate

1 reduction at issue in this case?

2 MS. SMITH: The 2008 rates --

3 THE COURT: No, no, answer the question. Do
4 you think there is one pending?

5 MS. SMITH: In the 10-0014 --

6 THE COURT: It's a yes or a no.

7 MS. SMITH: Yes.

8 THE COURT: Okay.

9 MR. MacDONALD: May we, your Honor, just so
10 the record is clear, I hate to interject, but what is
11 the SPA to which she --

12 THE COURT: I think she's about to tell us,
13 but I just want to start out with the state's position,
14 is there a SPA pending with respect to each Medicaid
15 reduction.

16 MR. MacDONALD: Okay, well, I --

17 MS. SMITH: Would you like me to address our
18 arguments or would you like Attorney Gordon to finish
19 his --

20 THE COURT: No, we'll get to his question
21 because I have the same question, because Mr. Davis is
22 hanging on, you know, and Mr. Davis doesn't know if he
23 represents anyone yet or not, but his position seems to
24 be we are going to deal with this and we are going to
25 rule on these and we're going to let you know what those

1 rulings are. And then so naturally the question arises,
2 rulings on what? And Mr. MacDonald is suggesting, yeah,
3 you're not going to get a ruling on a 30 percent
4 Medicaid reduction outpatient rate SPA because there is
5 none. You now say yes, there is one. So eventually
6 we're going to get to what is it? Point it out to me.

7 MS. SMITH: We included this chart for the
8 court in our pleading that we filed summarizing all of
9 the pending SPAs before CMS, and in 10-011 you'll see
10 that at the request of CMS the current price per point
11 which is regarding the inpatient SPAs has been included
12 in that SPA. And in 10-014 the percentage represented
13 to the outpatient, the outpatient rates is included in
14 that SPA that is submitted. As Attorney Davis stated,
15 the CMS's ruling on those SPAs is due by December 19th.
16 We have submitted the original SPAs and we've submitted
17 the request for additional information that CMS has sent
18 to the state --

19 THE COURT: You're saying 10 dash 011 and 10
20 dash 014 --

21 MS. SMITH: Correct.

22 THE COURT: -- address the outpatient rate
23 reduction?

24 MS. SMITH: 10-014 is the outpatient, 10-011
25 is the inpatient.

1 THE COURT: And those are pending?

2 MS. SMITH: Those are pending.

3 THE COURT: And the retroactive date cannot go
4 past, beyond the first day of the fourth quarter of
5 2010, right?

6 MS. SMITH: Let me address that.

7 THE COURT: Is it a fiscal year --

8 MS. SMITH: Particularly as to the outpatient
9 SPA, this is what CMS said in those comments --

10 THE COURT: Sorry, is that chart in here?

11 MS. SMITH: Yes. It is pages four and five of
12 your documents.

13 THE COURT: They are marked A and B --

14 MS. SMITH: It is in the state's memorandum.

15 And Attorney MacDonald was showing it to you from his
16 document. In the state's documents it is Exhibit F.

17 This is comments on the pending SPAs from CMS. And on
18 page two CMS was commenting regarding the 10-014 draft
19 SPA that had been submitted to CMS. And in the draft
20 SPA where the outpatient percentage had been added, the
21 state at CMS's request, based on discussions with CMS,
22 CMS have included the dates that those rates became
23 effective in 2008. And CMS's comments, if I can just
24 read it for the record, this suggested that they take
25 out the effective date regarding the percentage. And

1 then if you read the footnote --

2 THE COURT: I'm sorry, where are you reading?

3 MS. SMITH: It says that an effective date is
4 not required.

5 THE COURT: I'm sure it does, but where?

6 Where?

7 MS. SMITH: In the footnote, the effective
8 date under a cost methodology.

9 THE COURT: I've got it.

10 MS. SMITH: Reimbursement set at reconciled
11 cost represents an annual amount that changes based on
12 the provider's actual expenditures data for that
13 particular year. The State Plan methodology includes
14 the actual percentage of cost that will be reimbursed to
15 providers, therefore the State Plan methodology is
16 comprehensive as is as long as it contains that
17 information. As such, the State Plan methodology does
18 not require effective date language.

19 THE COURT: Well, you're far more aware of
20 what that means than I am. What does that mean?

21 MS. SMITH: That means that what was going on,
22 and if you'll look, actually the plaintiff's exhibits
23 regarding Exhibit A, their 2010 guidance to directors
24 about how State Plan amendments are going to be handled
25 going forward is consistent with what has happened over

1 this process. And when the 06, 008 SPA was submitted,
2 CMS was holding up approval of State Plan amendments
3 until they got other issues that they spotted reviewing
4 those things resolved as well in the process. What CMS
5 said in that 2010 guidance was that we're going to try
6 and move State Plan amendments forward quicker, and in
7 order to do that we're going to note these other issues,
8 but we're going to go ahead and take action on the
9 pending SPA.

10 It's undisputed that CMS had told the state
11 that the existing methodology in the State Plan
12 regarding outpatient costs was vague. It was general.
13 They asked the state to describe what was actually going
14 on. It wasn't a change. And the state did that in
15 submitting a response to requests for additional
16 information. And that's the paragraph that's now the --

17 THE COURT: I apologize for oversimplifying
18 it, but I think the claim here is you took an approved
19 methodology that the Secretary approved, and you took
20 one factor, state budget neutrality, and you made that
21 the sole driving factor in reducing the outpatient
22 Medicaid rate. And in order to do that you've got to,
23 says the plaintiff, you've got to at least file a State
24 Plan amendment and tell the Secretary that's what you're
25 going to do because that represents a serious change in

1 methodology or its application. You say, oh, no, we
2 blew it by them. We put state budget neutrality in
3 there and therefore we can use that and leverage it
4 however we choose.

5 The Secretary I guess some day is going to
6 decide whether you can blow it by that way or not, and
7 maybe she will decide you can. But if she decides you
8 can't, that you can't take that multi-faceted
9 methodology and reduce it to one factor, then do you
10 have a State Plan amendment that says we want to do it
11 that way? I suspect you don't.

12 MS. SMITH: Our position is --

13 THE COURT: Say the Secretary, I'm just
14 speculating, but say the Secretary says, you know what?
15 You didn't apply the methodology as approved. You
16 reduced it. You reduced it to one factor and you
17 applied one factor, and you can't do that. So that's
18 disapproved. Doesn't that not result in a
19 reconciliation with the hospitals under the terms of
20 which you would have to pay rates pre-reduction, isn't
21 that how it works?

22 MS. SMITH: I haven't analyzed that, your
23 Honor. I'm not ready to take a position on that.

24 THE COURT: But listening to you you seem to
25 be arguing that the Secretary could come out and say,

1 you know, you might have overbalanced one of the
2 factors, but taking the whole circumstance under
3 consideration and applying all kinds of other massages
4 to it, it's not all that bad and we would have approved
5 that. But if there's no SPA pending, they either have
6 to say, the Secretary either has to say it's okay under
7 the methodology as it existed, or the Secretary has to
8 say there's a SPA pending that we approved that allows
9 you to do that, and that's only effective back to the
10 first day in the court in which the SPA was filed. You
11 say there is a SPA -- you say two things as I understand
12 it. One, we get to do that under the existing
13 methodology. And two, there's a SPA pending that allows
14 us to do it. Right?

15 MS. SMITH: You are correct. We contend it
16 was, it is allowed under the existing methodology, and
17 as CMS has requested additional specificity in the State
18 Plan, it is now added --

19 THE COURT: You lose me on that. I don't know
20 what that means. Yes, we agree to talk, but whatever,
21 but it's the decision that's important, the decision
22 that's going to be made that's going to be important.

23 Which leads me back to my original question.
24 If you're right and you get to reduce the rates by
25 33 percent for budget neutrality factors under the

1 existing methodology as previously approved, what harm
2 is there that enjoins the rates unless and until the
3 Secretary decides that?

4 MS. SMITH: There is an immense harm to the
5 state's ability to continue to pay for its Medicaid
6 program and, you know, whether the state can continue to
7 make payments to the providers under its Medicaid
8 program, if they have to pay at higher rates for an
9 undetermined amount of time, although as Attorney Davis
10 has indicated, a decision should be made by
11 December 19th, that's still a hardship on the state that
12 could hamper the administration of the Medicaid program.

13 THE COURT: Okay.

14 MS. SMITH: And if checks can't go out, money
15 can't be transmitted to the providers, then that could
16 be an additional harm to the providers during that time
17 period.

18 THE COURT: All right, I think I said
19 something like that in one of the earlier orders, didn't
20 I?

21 MS. SMITH: Yes.

22 THE COURT: All right, okay.

23 MS. SMITH: I don't know that Attorney
24 MacDonald had finished his argument. If you wanted me
25 to --

1 THE COURT: No, I do want to be reasonably
2 clear so that he can be reasonably clear, which is you
3 say that this 10 dash 14, is it 11 dash 14? That is the
4 SPA, that is a SPA, at least, that failing your argument
5 that the methodology as previously approved justified
6 the rate reduction, there's at least this SPA that could
7 be approved that would justify it as of the first day of
8 the last quarter of 2010.

9 MS. SMITH: Correct.

10 THE COURT: And it's 10-014.

11 MS. SMITH: That is the outpatient one.

12 THE COURT: Right.

13 MR. MacDONALD: Just very quickly on the same
14 point, your Honor. Back to Exhibit B, CMS's comment
15 from August. This is I think a really helpful succinct
16 statement of what needs to happen for CMS to act. You
17 can't approve a SPA that contains an effective date for
18 reimbursement methodology that is earlier than the first
19 day of the quarter in which it was submitted, the point
20 the court was just making, and earlier than the date the
21 public notice was published.

22 Here's the chart we were just looking at. The
23 first public notice for each of these rate reductions,
24 March 30, 2012, pursuant to this court's order. So this
25 goes to the point, your Honor, what's the harm in

1 entering injunctive relief based on this record?

2 The public has an interest in a Medicaid
3 program that is operating legally. The beneficiaries,
4 like John Doe and others, and the patients the hospitals
5 serve, it's in the public interest to have a Medicaid
6 program that operates properly.

7 THE COURT: I don't disagree with you, I
8 really don't, but you have this insurmountable hurdle it
9 seems to me, which is, is it being operated consistently
10 with federal law. Is it? The state says yes, for two
11 reasons:

12 One, like it or not we had enough of an
13 insurance policy in the methodology we got the Secretary
14 to approve last time when we put budget neutrality in
15 there and that allowed us to reduce the rates as
16 necessary to achieve budget neutrality. Secretary may
17 or may not agree. We don't know. Some day we'll find
18 out.

19 Secondly, we've got a SPA, and okay, maybe the
20 SPA won't be effective back to the beginning, but we've
21 got a SPA. And but the Supreme Court has said, has it
22 not, you know, before you run off deciding whether or
23 not a rate reduction or a rate setting process is or is
24 not consistent with the comprehensive Medicaid
25 regulatory statutory scheme, you might want to get the

1 Secretary's views on that.

2 MR. MacDONALD: A couple of points, your
3 Honor.

4 THE COURT: And in fact it might even be a
5 primary jurisdiction matter, in which case you should
6 refer it, stay the case and wait for her decision.

7 MR. MacDONALD: Okay. A couple points, your
8 Honor. Even under their best case they can't enforce
9 these rates until the effective date of that 2010 SPA.
10 We're talking about rate reductions that took effect in
11 July 2008.

12 THE COURT: But no, of course they can, as
13 long as they're legitimate. It just begs the question,
14 why can't they enforce the rates?

15 MR. MacDONALD: Because the page has been
16 withdrawn. The effective date cannot possibly be in
17 here earlier according to CMS.

18 THE COURT: No, but there's overlapping
19 argument here. The reductions were consistent with
20 federal law because they were done pursuant to the
21 approved methodology properly applied. Argument one.

22 Argument two. To the extent there's any doubt
23 about that, we've got a SPA. Yes, the SPA doesn't go
24 back as far as the date in which we impose these rate
25 reductions, but whatever, they're going back somewhat.

1 First quarter in 2012 maybe.

2 MR. MacDONALD: On the first point, your
3 Honor, March 21, 2012, CMS tells the state in reviewing
4 the language that they relied on in the SPA, in this SPA
5 right here --

6 THE COURT: 14?

7 MR. MacDONALD: This goes back to 2006, the
8 SPA they relied on.

9 THE COURT: Which SPA?

10 MR. MacDONALD: This is called 06-008.

11 THE COURT: The one that's been withdrawn?

12 MR. MacDONALD: Yes.

13 THE COURT: Okay.

14 MR. MacDONALD: And CMS told the state that
15 the language I've highlighted is not comprehensive.
16 They need to get rid of it because it doesn't tell CMS
17 how much CMS is going to be on the hook for in terms of
18 federal participation. That's the language the state
19 relied on to make the across-the-board reduction. Now
20 if we could get what the 2010 page looks like, and I'll
21 show you the difference.

22 THE COURT: But does that address the question
23 we properly reduced the Medicaid outpatient
24 reimbursement rate pursuant to a budget neutrality
25 factor that's acceptable to the Secretary?

1 MR. MacDONALD: She says you can't do it that
2 way. You can't --

3 THE COURT: She hasn't said that yet.

4 MR. MacDONALD: Yes, she did, because she made
5 the state take out the language. And you know what she
6 made them put in?

7 THE COURT: Which language? State budget
8 neutrality language?

9 MR. MacDONALD: This is the way the SPA reads
10 now. This is what CMS wants in there. It wants to know
11 the actual percentage that will be reimbursed. It's the
12 highlighted language.

13 THE COURT: The current reimbursable amount,
14 that language?

15 MR. MacDONALD: Yes. That's new. And that's
16 what CMS insisted go in there to establish a clear
17 methodology. And when did they insist that go in there?
18 This year. That's the methodology that's enforceable
19 from the Secretary's point of view.

20 THE COURT: Again, I really apologize for the
21 question, but, how does that address the issue of
22 whether or not the rate reduction when it was effective
23 was or was not consistent with the existing approved
24 methodology? You're saying later. I want you to be
25 more specific. Doesn't say anything about was it okay

1 to do it under that approved methodology.

2 MR. MacDONALD: It was not an approved
3 methodology. It was a proposed plan. It was not an
4 approved methodology.

5 THE COURT: The language about state and
6 federal budget neutrality methodology was not approved?

7 MR. MacDONALD: This language right here, that
8 was a pending unapproved plan at the time the state
9 relied on it. And the state relies on language that is

10 --

11 THE COURT: But this is different from the
12 methodology that's set out in the State Plan. The
13 methodology set out in the State Plan, does it not,
14 refers to many factors, one of which is state budget
15 neutrality.

16 MR. MacDONALD: It does not.

17 THE COURT: It does not?

18 MR. MacDONALD: No. We will put it on the
19 screen, your Honor.

20 THE COURT: Attorney Smith, is that not your
21 argument? Am I wrong about that? Is that your position
22 or not?

23 MS. SMITH: Pardon?

24 THE COURT: I thought your position was the
25 approved methodology includes, among other factors, a

1 factor that relates to state budget neutrality problems,
2 and that that's what you relied on.

3 MS. SMITH: The outpatient approved language
4 which was from 1995 is actually cited in our brief --

5 THE COURT: I'm sure it is but what's the
6 answer?

7 MR. MacDONALD: It's on the screen, your
8 Honor.

9 MS. SMITH: And it refers to the lowest level
10 determined by the state Medicaid agency. That is the
11 language regarding the outpatient, approved outpatient
12 methodology that was in effect. The inpatient --

13 THE COURT: The approved methodology is
14 whatever the state's lowest determined reimbursement
15 rate, that's the methodology?

16 MS. SMITH: That was what was in the State
17 Plan. And I know the court commented at the last
18 hearing when we discussed that, but that's hard to know
19 what that means.

20 THE COURT: It means whatever you feel like
21 paying in a given year.

22 MS. SMITH: The inpatient, how that has been
23 applied was as a percentage of cost that was adjusted
24 regarding budget neutrality factors. The inpatient --

25 THE COURT: Where does that come from? Where

1 does that come from? I thought that was -- I'm sure
2 I've read that in the methodology. State budget
3 neutrality.

4 MS. SMITH: The inpatient approved language
5 had actual language regarding budget neutrality.
6 There's two separate sections for inpatient and
7 outpatient in the State Plan.

8 THE COURT: Okay, just let me make sure I've
9 got that clear. State budget neutrality inpatient
10 reduction, outpatient reduction, lowest amount state
11 approves.

12 MS. SMITH: Correct.

13 THE COURT: And your position is both those
14 methodologies that included those factors were approved
15 by the Secretary.

16 MS. SMITH: Correct.

17 MR. MacDONALD: Your Honor, the approved
18 outpatient language is on the screen. Payment is made
19 in accordance with the methods and principles developed
20 for reimbursements for such services for hospitals
21 participating in Title 18. Translate. You pay on
22 Medicare rates. That's the methodology.

23 Now, what they're relying on is a highly
24 selected reading of the second sentence. On certain
25 medical services and supplies designated by the

1 Secretary, not the Commissioner, the Secretary, you can
2 charge the lowest level determined by HHS.

3 That is not the methodology that they
4 employed. The methodology here is you pay Medicare
5 rates.

6 THE COURT: And obviously it follows that
7 you're saying the Secretary never designated outpatient
8 services as --

9 MR. MacDONALD: Precisely.

10 THE COURT: Okay. You know, I appreciate
11 getting me this detail but of course that's not really
12 the focus for me here today.

13 MR. MacDONALD: May I, just on the primary
14 jurisdiction.

15 THE COURT: Yes, that's the issue. The issue
16 is do we wait for the Secretary's, not, and Mr. Davis,
17 not a decision, you know, it's not my providence to
18 direct or dictate to the Secretary when she gets around
19 to deciding these things, but just whether she thinks
20 it's a primary jurisdiction issue or it's not.

21 Eventually I'll decide that because there's a strong
22 argument that primary jurisdiction frankly has nothing
23 to do with this case, and I'm not sure if it does or
24 doesn't. But again, as the Supreme Court instructed in
25 Douglas, the Secretary's views would be useful in

1 determining that.

2 So the issue is, really irreparable harm in
3 the next two months. Seriously, what is it?

4 MR. MacDONALD: Yes.

5 THE COURT: What is it?

6 MR. MacDONALD: The irreparable harm, the
7 public's interest is being harmed by running an illegal
8 Medicaid program at least --

9 THE COURT: If I balance that against the harm
10 visited upon the state by injunctive relief and
11 disrupting the whole payment scheme that may be
12 subsequently approved by the Secretary, it kind of
13 washes out at least, doesn't it?

14 MR. MacDONALD: I respectfully disagree, your
15 Honor, because the whole rationale for jamming down
16 these rate reductions was the state needed to balance
17 its budget regardless of its obligations under the
18 Medicaid Act, regardless of its obligations to the
19 beneficiaries and to the patients the hospital serves.
20 And now they are using the same excuse? No. No. A
21 very important distinction between this and the Douglas
22 case, the state in Douglas actually when the rate
23 reimbursements were enacted by the legislature, they did
24 what they're suppose to do. They went to CMS and they
25 said we need to get approval for this. And while that

1 was pending the plaintiff went to court and got an
2 injunction. Their interests were protected under the
3 same rationale that the court has just articulated. And
4 that's what you have here. Yes, there's irreparable
5 harm. There's been irreparable harm since 2008.

6 THE COURT: Well, irreparable harm, you know,
7 no hospitals have left the program. I know some
8 programs have diminished. The state says those patients
9 have all been accommodated. It's really a money issue.
10 As you pointed out in your argument, reconciliation of
11 the accounts will, if you're right, ultimately result in
12 recompensation, recompense for that. So what's the real
13 irreparable harm?

14 MR. MacDONALD: Well, I would just -- we've
15 included in our materials a very interesting statement
16 of interest filed by the United States in an Indiana
17 case. And the issue there was the Indiana legislature
18 enacted a bill to require that all Medicaid providers
19 not provide abortion services. The Indiana Commissioner
20 submitted a State Plan to enact or approve that
21 legislation, which by the way is proper, and should have
22 happened when the state enacted the statute we've talked
23 about but didn't. And within two weeks CMS said no, we
24 disapprove. And one of the very interesting things
25 about this area of the law is, when the State Plan

1 amendment is denied, there is all sorts of process that
2 the state gets. Appeal to the Secretary and then a
3 full-blown administrative process. And the United
4 States was concerned that while that was going on these
5 services, these abortion services would somehow be
6 limited. And you know what the United States did? It
7 got, it filed a statement of interest in that case and
8 it said this is wrong. It's violating the law. And
9 it's in the public interest to stop violations of the
10 Medicaid Act. Court, you need to enter an injunction,
11 even though a State Plan amendment had been denied.

12 That is the level of --

13 THE COURT: Well, because the State Plan
14 amendment had been denied.

15 MR. MacDONALD: Yeah. Absolutely.

16 THE COURT: And here we don't have a decision
17 from the Secretary.

18 MR. MacDONALD: We have one that these rates
19 are invalid. We have that. We have -- she's saying --

20 THE COURT: Where does that come from? I
21 don't see that.

22 MR. MacDONALD: The Commissioner has withdrawn
23 the page that supported these rates, and he withdrew it
24 because CMS told him to. And CMS told him to because
25 the methodology wasn't sufficient and there was no

1 public notice. That's what happened.

2 THE COURT: Is that what happened?

3 MS. SMITH: No.

4 THE COURT: What happened?

5 MS. SMITH: The approved methodology is in, we
6 did not attach it, the old SPA, to the documents, but
7 it's cited on page 22 of our memorandum. It was in ECF
8 docket 98-4. That's regarding the outpatient one.

9 That's where that approved outpatient methodology is.

10 What happened in the 06-008 SPA was the state
11 submitted a State Plan amendment that was not changing
12 the outpatient methodology at all. That SPA has not
13 been withdrawn. The part of that SPA that was initially
14 submitted is still pending before the Secretary.

15 THE COURT: That part that relates to
16 outpatient rates.

17 MS. SMITH: No, that SPA as initially
18 submitted didn't talk about the outpatient methodology
19 at all. CMS under its then process, because we were
20 making a change elsewhere on that page, read this
21 methodology language that dates from 1995 and said gee,
22 we want that to be more specific. Tell us what you're
23 doing. So we submitted an amendment to that page that
24 laid out what was being done under the existing
25 methodology. It was more specific. And that language

1 also appeared in the initial State Plan amendment
2 submitted in 08-017, which you have, and in 10-014, that
3 same first paragraph on page 4.19B, was in the SPA as
4 submitted in 2010. That's the clarification that CMS
5 had asked for. And yes, they said -- and if you read
6 that, Plaintiff's Exhibit A about how they're going to
7 deal with getting clarification of vague language in
8 State Plan amendments, what they've done is they've said
9 since you've submitted this in subsequent SPAs it
10 doesn't need to be in 06-008 anymore.

11 So yes, that has been taken out of 06-008.
12 But it was in 10-014 as initially submitted, and in the
13 RAI process they've asked okay, you've said it's a
14 percentage of cost, we're now, now we're a few years
15 later, we'd like to see the actual percentage in there
16 as well. So that has been added to 10-014. But the
17 language --

18 THE COURT: So is it your position that it's
19 possible that the Secretary could, through CMS, could
20 say at some point these are all requests for
21 clarification of a methodology that was x'd out, and
22 although -- and we're happy to have this clarification,
23 but in terms of were these rate reductions permissible
24 under federal law under the approved methodology, yes,
25 they were.

1 MS. SMITH: Are you asking me could the
2 Secretary say that?

3 THE COURT: Yes, is that your position, that's
4 a potential outcome here?

5 MS. SMITH: Yes.

6 THE COURT: And the reason being because,
7 okay, it was vague and unclear and whatever and we've
8 since clarified it, but the fact remains that the
9 methodology was the methodology and these rate
10 reductions do comport with it.

11 MS. SMITH: Yes.

12 THE COURT: Okay. And it gets right back to
13 the primary jurisdiction. Isn't that in the first
14 instance within the expertise of the Secretary to
15 determine whether that's bogus or whether that's
16 legitimate?

17 MR. MacDONALD: I would submit she's already
18 determined that the methodology was insufficient. She's
19 made them rewrite the State Plan page.

20 THE COURT: Well, you say rewriting. The
21 state says clarify. Isn't that itself a decision that
22 the Secretary is going to have to make, whether she
23 decided or didn't decide?

24 MR. MacDONALD: Your Honor, in the record
25 before there is an unambiguous statement from CMS that

1 the language the state relied on was not comprehensive.

2 Did not meet the requirement --

3 THE COURT: Sure, but that begs the question,

4 okay, I agree, it's not comprehensive and you'd like

5 clarification. But my question is, is the rate

6 reduction that we effected pursuant to that methodology

7 acceptable to you or not, Secretary? The answer isn't,

8 well, the language wasn't comprehensive, so that answers

9 the question. No, it doesn't answer the question. It

10 answers the question was the language comprehensive or

11 not, but it doesn't answer the question is the rate

12 reduction consistent or not consistent.

13 MR. MacDONALD: With.

14 THE COURT: With the methodology as written

15 vague and incomprehensive -- incomprehensively. I

16 reduced the rates. Really? How did you do that? Well,

17 we were told to do it. But happily the rate reduction

18 is consistent with federal law, there's no supremacy

19 clause claim here because although we did it pursuant to

20 the state directive, happily it's consistent, not

21 inconsistent with what federal law would require.

22 Really? Why is that? Well, because we had this vague

23 and incomprehensive methodology pursuant to which this

24 rate reduction is legitimate. Is it really? Well, I

25 don't know. I should decide that. I don't think I'd

1 have a lot of trouble doing it. The Secretary really
2 should decide that first, shouldn't she, because maybe
3 the answer is, okay, it is.

4 MR. MacDONALD: The reason I'm standing up on
5 this particular rate reduction, the outpatient rate
6 reduction, she's already answered that question.

7 THE COURT: I know you say that, but all you
8 point to is we suggest you withdraw because it's not
9 comprehensive enough. And I'm suggesting to you that's
10 a far cry from a statement that says, by the way, that
11 rate reduction is inconsistent with the methodology that
12 I approved.

13 MR. MacDONALD: Well, let me just point you to
14 some language. Footnote two.

15 THE COURT: And I think, again, correct me if
16 I'm wrong, I mean, you know, Mr. Davis, you know what,
17 what I've seen out of CMS doesn't tell me anything about
18 what the process is that's going on, not that there's
19 some obligation to, but I'm assuming that the process
20 that's going on is precisely that. Are these rate
21 reductions legitimate or illegitimate under the existing
22 federal requirements?

23 MR. DAVIS: That's correct, your Honor, the
24 SPA review process is complicated. It involves a lot of
25 correspondence back and forth between the state and the

1 federal government, and the expression of CMS is usually
2 found in the final decision, not in anything that's been
3 exchanged back and forth.

4 THE COURT: You take Mr. Davis's point.

5 MR. MacDONALD: I do, but one of the prisms
6 through which the Secretary looks, CMS looks, is whether
7 the methodology in the State Plan is comprehensive. Why
8 do we need to know that? Because the federal government
9 needs --

10 THE COURT: No, let me agree with you, it's
11 not comprehensive in my judgment. You know, forget the
12 Secretary for a moment. In my judgment they're right,
13 it's not. The question remains whether rate reduction
14 is consistent or inconsistent with the approved
15 methodology. Telling me it wasn't comprehensive doesn't
16 answer that question.

17 MR. MacDONALD: Here, on the screen. The
18 State Plan methodology now, it now contains, the State
19 Plan amendment that I put up now contains the actual
20 percentage of cost that will be reimbursed to providers.

21 THE COURT: Didn't before but now it does.

22 MR. MacDONALD: Exactly.

23 THE COURT: But, so, does that retroactively
24 mean that a rate reduction was illegitimate because it
25 didn't put the actual cost --

1 MR. MacDONALD: Absolutely.

2 THE COURT: Why?

3 MR. MacDONALD: Absolutely. Because the
4 federal government needs to know how much money it's
5 going to spend.

6 THE COURT: Vague standard. Tight standard.

7 Rate reduction. Does it fall within vague if it falls
8 within tight? Doesn't it? If tight is a clarification
9 of vague, doesn't it fall within the sphere. Couldn't
10 it?

11 MR. MacDONALD: Think of the prior
12 methodology. Think of it. The prior methodology is
13 that the Commissioner could reduce the rates to a
14 dollar. That's the prior methodology.

15 THE COURT: Well, that's their construction of
16 the prior methodology. But again, I'm sorry, but I keep
17 coming back to, but CMS may not agree, they may agree I
18 guess, but hasn't the Supreme Court said in Douglas at
19 least get the Secretary's views on it, if they're
20 useful, and it seems to me this is critically useful.

21 MR. MacDONALD: With an injunction --

22 THE COURT: Otherwise I substitute my
23 construction of what the methodology should be and how
24 it should be construed and so on, which I'm happy to do,
25 by the way, as long as it's not a primary jurisdiction

1 issue.

2 Isn't your stronger argument that it's nothing
3 to do with whether it happily coincidentally flies with
4 state -- with federal law because the genesis of the
5 change is actually a state statute that conflicts with
6 the federal law?

7 MR. MacDONALD: Absolutely. It's point one in
8 our argument. Preemption is an Article III question.

9 THE COURT: Justice Thomas, it's not
10 preemption, it's supremacy -- or it's not preempted,
11 it's a nullity.

12 MR. MacDONALD: Fair enough, but yes,
13 absolutely, and that is our principal argument. But I
14 would say, your Honor, 60 days, whatever it is,
15 180 days, it's a long process. It's a cumbersome
16 process. And by the way, it's not a process that we're
17 a party to.

18 THE COURT: I understand. I understand.

19 MR. MacDONALD: But why not a status quo
20 injunction? Why not? What's the harm while the court
21 gets wisdom from CMS? That's what happened in Douglas.

22 THE COURT: Yeah, I think I referred to that
23 in an earlier order. The harm is I guess at this point
24 a pretty serious disruption of the fiscal operation of
25 the state. I guess it would be. I mean, that's the

1 representation.

2 MR. MacDONALD: Well, they're going to have to
3 find the money to run a Medicaid program that is
4 consistent with federal law.

5 THE COURT: Unless the Secretary comes back
6 and says, well, you know, we don't like what you did but
7 it's okay. Right? Unless they come back.

8 MR. MacDONALD: Okay, you know, as a date
9 certain. And I just want to emphasize --

10 THE COURT: Yeah, I'm not in a position to
11 require a date certain. I'm not. That's an Executive
12 Branch administrative possess and they do their thing.
13 All I can do is say delay is too long, we're not going
14 to wait, or I can say you waived it because you've
15 declined to participate, or you won't tell me whether
16 you think it's primary jurisdiction or not, in which
17 case you waive, and I'll just go ahead and decide it.

18 But what I hear Mr. Davis saying is I'm not sure what my
19 authority is, I don't think I have any authority, but I
20 might have some authority, and yes, we're at least
21 looking at this and we hope to have an answer in the
22 next several months, but no promises. That's what I
23 hear him saying. But I feel like I'm somewhat compelled
24 by the Douglas opinion to at least give them a
25 reasonable opportunity to tell me if they're going to

1 tell me.

2 MR. MacDONALD: Well, I would just again point
3 to the authoritative guidance from the First Circuit --

4 THE COURT: No, I accept that point. I accept
5 that point. And I think, you know, I don't know how
6 long CMS has been flagellating this thing but it's been
7 a year or so.

8 MR. MacDONALD: It has been a year. It's been
9 almost a year.

10 THE COURT: I don't think it takes a year to
11 figure out whether a rate reduction is or not consistent
12 with federal law. I don't know what the heck they're
13 doing, but --

14 MS. SMITH: Is Attorney MacDonald done?

15 THE COURT: He seems to be.

16 MS. SMITH: I didn't want to interrupt, but
17 just, you know, I think I made my points in the course
18 of the discussion this morning. I just want to add two
19 things.

20 First, regarding the primary jurisdiction.

21 You know, we think this is an area of primary
22 jurisdiction for the Secretary. Once we get past the is
23 there a -- you know, the court said we're past the is
24 there a supremacy clause claim, the question at that
25 point then is, is it consistent with the Medicaid law.

1 THE COURT: You know, I don't want to hold out
2 too much hope for you, only in the sense, only in the
3 following sense from my view as I sit here is, is there
4 a supremacy clause claim? Yes, there is. Is it viable?
5 I don't know. That turns on whether or not there's
6 grounds for equitable relief. Equitable relief requires
7 irreparable injury. What's the irreparable injury? If
8 in fact there's no conflict between what clearly -- you
9 can't have a state statute that dictates Medicaid rate
10 setting that's inconsistent with federal law, don't we
11 all agree with that?

12 MS. SMITH: Yes.

13 THE COURT: Okay. So, if that's what happened
14 an injunction will be easy, that's no problem, it will
15 be issued. But we have this equitable relief argument
16 which is, well, is there any irreparable injury? And I
17 take your point that, well, if happily we acted quite
18 illegitimately and illegally for our own pecuniary
19 reasons, but happily it turns out that what we did is
20 consistent with federal law, there's no harm, right,
21 because the rates are legitimate under federal law,
22 therefore there's no conflict between state and federal
23 law, therefore there's no supremacy claim that warrants
24 any relief. But to know that you have to know whether
25 it's consistent or inconsistent with federal law, and to

1 know that the Supreme Court says you might want to
2 consider what the Secretary thinks because it's her area
3 of expertise. Hence we're here. But Mr. MacDonald
4 makes the great point, you know, yes, but not while
5 bureaucrats fuddle and diddle and shuffle and delay and
6 do everything but decide. Not that.

7 MS. SMITH: But there has been, and I won't go
8 through each piece of what we submitted, there has been
9 a lot going on.

10 THE COURT: Oh, I read the correspondence and
11 I'm mystified how anybody can write in such length and
12 say nothing. It's amazing. It's a talent.

13 MS. SMITH: There have been three access
14 reports submitted to CMS since this court --

15 THE COURT: Has anybody ever sent you a letter
16 from CMS saying you know what? We've got some real
17 doubts about what we did here. Anybody said that? It's
18 all, you know, clarify, withdraw, consider, maybe, what.

19 MS. SMITH: There was a May 23rd letter from
20 Cindy Mann to Commissioner Toumpas which is in the
21 documents you have saying show us how, what you've done,
22 you know, is consistent with Section 30(A).

23 THE COURT: Yeah, that's different from saying
24 you know what? We've taken a look at this and boy, this
25 is bad, justify, we're going to disapprove it.

1 MS. SMITH: I didn't quite hear that.

2 THE COURT: I don't see anything in here where
3 CMS actually takes an accountable stand and somebody
4 makes a deliberation and said look, preliminary this
5 looks bad, what do you have to say for yourself.

6 MS. SMITH: We felt that they asked those
7 questions in the May 23rd letter from Cindy Mann. They
8 asked us to show us the access issues. They said it
9 relates to the approval of the pending SPAs.

10 THE COURT: Okay, well --

11 MS. SMITH: But just my closing point was,
12 there's been a lot of talk about, as the court said, our
13 argument has always been that the rate reductions in
14 2008 were within the existing methodology. We can argue
15 or we can talk about whether or not having a general
16 standard is better than having a very specific standard.
17 But the fact that --

18 THE COURT: No, I think it's can you have a
19 standard that says although this looks like a lot of
20 different factors and standards, there's only one, what
21 we decide to pay. Or do we have to actually have a real
22 standard? I think the answer is you have to have a real
23 standard.

24 MS. SMITH: Those standards were approved by
25 CMS in the past.

1 THE COURT: No doubt about it, but not your
2 interpretation.

3 MS. SMITH: We would -- CMS has been very much
4 aware --

5 THE COURT: That elephant is much like a
6 snake. Maybe it is, but make it's not. Maybe it's like
7 an elephant. But I guess the Secretary is going to tell
8 you whether it's a snake or an elephant at some point.

9 MS. SMITH: What I'm suggesting is that if the
10 desire is to get from a general standard to a very
11 specific standard --

12 THE COURT: No, I take your point, I take your
13 point, and I agree with you. That evolutionary
14 bureaucratic clarification never ending process is
15 probably beside the point. The point is not are you
16 clarifying unendingly. The point is, is what you did
17 consistent or inconsistent with the applicable standard
18 at the time you did it. Is it or isn't it.

19 MS. SMITH: Correct.

20 THE COURT: All right. So that is the
21 unending clarification, discussion, exchange of letters
22 and everybody speaking in euphemisms and innuendo. It
23 doesn't matter. What matters is what does the Secretary
24 think what you did or when you did it and whether it's
25 consistent or inconsistent with federal law. That's

1 what happened. And Mr. Davis seems to be implying that
2 they might actually make a decision about that.

3 MS. SMITH: And I submit that that decision
4 will be made regarding the seven pending SPAs by
5 December 19th.

6 THE COURT: Well, maybe, or maybe there will
7 be a request for more information that triggers a delay,
8 et cetera, right?

9 MS. SMITH: We have received no indication
10 that there will be, and they --

11 THE COURT: I think it only happens when they
12 want more time, doesn't it?

13 MS. SMITH: Pardon?

14 THE COURT: That only happens when they want
15 more time. Isn't that how it works? I want more time.
16 Let's ask for more information, all right, that starts
17 the clock again and the deadline doesn't really mean
18 anything unless the Secretary wants it to mean
19 something.

20 MS. SMITH: We have no indication that that's
21 what CMS is going to do.

22 THE COURT: But that's the history. You can't
23 read these documents without seeing it. That's the
24 history.

25 MS. SMITH: Every indication we receive is

1 that CMS wants to get these done.

2 THE COURT: Good. I do, too.

3 MR. MacDONALD: I would just add to what you
4 just said. I just want to add one very important point.

5 There has to be public notice. There has to be public
6 notice. And the only public notice with these rate
7 reductions was the public notice that you ordered in
8 March of this year, and that's in your --

9 THE COURT: Well, you know, again, I hate to,
10 I always feel like I'm oversimplifying it, but not if
11 the rate reductions were consistent with the approved
12 methodology at the time rate reductions were made. Then
13 there's no notice of requirement because it's
14 consistent. You don't notice every time you
15 consistently and legitimately apply the methodology
16 that's been approved. You just apply it.

17 MR. MacDONALD: Well, there are two notice
18 requirements, but when you're changing the methods and
19 standards --

20 THE COURT: That's an argument. That's an
21 argument. The state says we didn't.

22 MR. MacDONALD: Exactly.

23 THE COURT: Yeah, so if they didn't, then
24 there's no notice requirement. If they did, then there
25 is. But again, we come back to, gee, who is best

1 equipped to make that kind of subtle decision in terms
2 of administering this complex regulatory scheme. And
3 the Supreme Court has said that Congress has said that's
4 the Secretary.

5 But I take your point about delay, I really
6 do. Here's what I think. Mr. Davis, I'm construing
7 your comments today to say that by December 19th the
8 Secretary will have either decided this issue or she'll
9 be prepared to give her views so that I can take
10 advantage of those views in deciding how to resolve this
11 petition for equitable relief, and I'm just giving you a
12 heads-up. If we're going to get more shuffle or delay
13 or we don't know whether we want to tell you whether we
14 want to tell you, that I'm going to deem that to be a
15 waiver by the Secretary for interest in any primary
16 jurisdiction argument and I'll go ahead and decide the
17 issue including the substantive questions about whether
18 these rate reductions do or do not comply with federal
19 law. So, I don't know what else to do because you can't
20 seem to give me a definite input as to whether or when
21 you're going to participate.

22 MR. DAVIS: Your Honor, we'll provide our
23 views as soon as we possibly can, assuming that we get
24 authorization granted. I completely understand your
25 Honor's frustration with this and we will move as

1 quickly as possible, and I can tell you that --

2 THE COURT: Well, I mean, don't worry about my
3 frustration because I have a way of dealing with it and
4 I'm telling you the way I'm dealing with it. The way
5 I'm dealing with it is, you know, put up or don't. Your
6 call. Up to you completely. But let the Secretary know
7 that I interpret your comments as saying I don't know
8 what my authority is, I don't know what my position is,
9 I don't know if I have authority to tell you when my
10 position develops whether I should tell you or don't
11 tell you. I understand. I don't like it. But if
12 that's the Secretary's position, the Secretary should
13 understand that post December 19th we're going to have
14 another hearing and if the Secretary is still unsure
15 about whether she wants to tell me what her position is
16 or not, I'm going to deem any claim that she might have
17 to primary jurisdiction in this case to have been waived
18 and I'm going to find, as Mr. MacDonald suggests, that
19 delay is intolerable beyond that point and I'll go ahead
20 and decide the case, including the substantive questions
21 about whether these rate reductions are or are not
22 consistent with federal law.

23 MR. DAVIS: I understand that, your Honor, I
24 will convey that to CMS.

25 THE COURT: Okay. We'll reschedule, resume

1 this hearing December 19th is the date, so I'm not sure
2 what day that is. Wednesday. Why don't we say
3 December 20th. We will resume the hearing on
4 December 20th. And, you know, understand, I mean what I
5 say. If we don't have any substantive participation by
6 the Secretary with regard to her views on this, I'll go
7 ahead and decide it and I'll do it promptly.

8 MR. MacDONALD: Thank you, your Honor.

9 (Hearing adjourned at 11:55 a.m.)

10

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12 C E R T I F I C A T E

13

14 I, Sandra L. Bailey, do hereby certify that
15 the foregoing transcript is a true and accurate
16 transcription of the within proceedings, to the best of
17 my knowledge, skill, ability and belief.

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Sandra L. Bailey
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